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In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 753

SUZANNE THOMAS RICHARDS, nee Wadlow, individually and for the use and benefit of DEBRA SUE RICHARDS, ET AL.,
Petitioners,

—against—

UNITED STATES OF AMERICA, and AMERICAN AIRLINES, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC., IN OPPOSITION

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

Respondent American Airlines, Inc., urges that the petition be denied for the following reasons:

I.

There is no conflict between the decision of the Court of Appeals in this case and decisions of other Courts of Appeal respecting the same issues.

II.

No question of importance is presented to the Court.

ARGUMENT

I.

There is no conflict between the decision of the Court of Appeals in this case and decisions of other Courts of Appeal respecting the same issues.

In deciding this case adversely to the petitioners,[1] the United States Court of Appeals for the Tenth Circuit construed the Federal Tort Claims Act[2] to mean that the waiver of immunity in suits for tort against the United States was controlled by and referable to the substantive law of that state in which the negligent act or omission complained of had occurred.[3] The same construction was given the Act by the United States Court of Appeals for the District of Columbia in the case of *Eastern Airlines* v.

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[1] *Richards* v. *United States* (C.C.A. 10th), — F.2d —, contained in the Appendix to petitioners' brief, pp. 30-38.

[2] Federal Tort Claims Act, 28 U.S.C., Secs. 1346(b), 2674.

[3] The decision, that the substantive law involved in this controversy, the Oklahoma Wrongful Death Act, Title 12, O.S., Sec. 1051 *et seq.*, has no extra-territorial application, certainly does not conflict with the decision of any case cited by petitioners.

Union Trust Company.[4] The only other decision directly bearing upon this question was the case of *United States* v. *Marshall,*[5] wherein the United States Court of Appeals for the Ninth Circuit construed the Act to determine the law applicable to such an action by reference to the entire law, including the rule of conflict of laws, of that state wherein the negligent act or omission occurred. The apparent conflict between the decision in this *Marshall* case, when compared to the decisions of the Tenth Circuit Court of Appeals[6] and the District of Columbia Court of Appeals,[7] is seen more as a difference of form, rather than of substance, when the results of the cases are analyzed and compared.

It is obvious that both the Tenth Circuit Court of Appeals, herein, and the Ninth Circuit Court of Appeals[8] recognized and held applicable to the Federal Tort Claims Act the rule of conflict of laws found in that state wherein the negligent act or omission of the Government was alleged to have occurred. That was the basis of the decision of the *Marshall* case; it was recognized, but held to be moot, in the decision of the *Richards* case by the Tenth Circuit Court of Appeals.

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[4] *Eastern Airlines* v. *Union Trust Company* (App. D.C.), 221 F.2d 62, *cert. denied* on the application of Union Trust Company (complainant in the trial court), 350 U.S. 911, 76 Sup. Ct. 192, 100 L. Ed. 799, holding applicable the Virginia Wrongful Death Statute.

[5] *United States* v. *Marshall* (C.C.A. 9th), 230 F.2d 183.

[6] In *Richards* v. *United States, supra.*

[7] In *Eastern Airlines* v. *Union Trust Company, supra.*

[8] *United States* v. *Marshall, supra.*

In the *Eastern Airlines* case[9] the litigants stipulated that the Wrongful Death Statute of either the District of Columbia or the Commonwealth of Virginia would be applicable and determinative of their respective rights[10]:

> "The final decision in the *Miller* cases on the (a) question of liability of the various defendants named in the *Miller* cases, and (b) the question as to whether the *Wrongful Death Statute* of the District of Columbia or the Commonwealth of Virginia is applicable, shall be conclusive and binding on these issues upon all of the parties to this stipulation in each of the cases captioned above" (Italics supplied).

This stipulation between the litigants was recognized and adhered to by the Court in the decision of Cook v. *United States*.[11]

II.

No question of importance is presented to the Court.

The Federal Tort Claims Act has been in existence since the first day of January, 1945, a period of some fifteen years. Petitioners herein have cited only five cases involving, even remotely, a multi-state tort.[12]

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[9] *Eastern Airlines* v. *Union Trust Company, supra.*

[10] Appendix, pp. i-vi, *infra.*

[11] *Cock* v. *United States* (C.C.A. 2nd), 274 F.2d 689; another of the *Miller* or *Eastern* cases (*i.e.*, arising out of the same controversy).

[12] *Eastern Airlines* v. *Union Trust Company, supra; Marshall* v. *United States, supra; Hess* v. *United States* (C.C.A. 9th), 259 F.2d 285, reversed on other grounds, 361 U.S. 314, 80 Sup. Ct. 341, 4 L. Ed.2d 305; *Voytas* v. *United States* (C.C.A. 7th), 256 F.2d 786; *Richards* v. *United States, supra.*

This Court expressly held in *Hess* v. *United States* that the issue of a multi-state tort was not involved.[13]

It is clear that the *Voytas*[14] case was not decided upon this issue, simply holding that, irrespective of the applicability of either the law of Illinois or the law of Virginia, the plaintiff could not recover—no duty had been breached by the Government under the laws of either state.

Thus the only three decisions remaining during this period of fifteen years are the decisions of the *Marshall*, *Eastern*, and *Richards* cases, all of which hold that the law to be applied in a Federal Tort Claims Act case is the law of the place where the act or omission occurred. Further, this record of fifteen years' experience under the Act is but a reflection (1) that the overwhelming majority of suits under the Act arise where the situs of the negligence, of the accident, and of the resulting damage is the same, being in one jurisdiction,[15] and (2) that even in those few instances where negligence is alleged to have occurred in one jurisdiction, with injury or death resulting in another, the uniformity of the laws among the several states renders the apparent conflict a distinction without a legal difference. It is only in those infrequent, rare occasions, as here,

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[13] *Hess* v. *United States*, 361 U.S. 314; the notation at p. 318 reads: "This case does not involve the question that would be presented if wrongful conduct occurring within the territory of one political entity caused injury or death within a different political entity. Cf. *Eastern Airlines* v. *Union Trust Company*, 95 U.S.App. 189, 221 F.2d 62."

[14] *Voytas* v. *United States*, *supra*.

[15] *Knecht* v. *United States* (C.C.A. 3rd), 242 F.2d 929.

where a statutory provision of one state would give a significant difference to the remedy, that the question will arise.

CONCLUSION

The decisions of the various United States Courts of Appeal, with reference to the applicable law when wrongful conduct occurs in one political entity, and injury or death results in another, uniformly and unanimously hold that the law of the place where the act or omission occurred, or the situs of the wrongful conduct, is applicable.

By reason of the stipulation between the litigants in the *Eastern Airlines* case,[16] the United States Court of Appeals for the District of Columbia was not required to consider, and did not decide, any issue concerning the extra-territorial application of the Virginia Wrongful Death Statute, nor the application of the conflicts of law rule of the Commonwealth of Virginia.

The *Richards* case[17] held that the Wrongful Death Act of Oklahoma contained no provision for extra-territorial application, but recognized and approved the holding of the *Marshall* case[18] concerning the applicability of the conflicts of law rule of the state where the wrongful conduct occurred.

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[16] *Eastern Airlines* v. *United States, supra.*

[17] *Richards* v. *United States, supra.*

[18] *Marshall* v. *United States, supra.*

The extreme infrequency of an occurrence such as that involved herein, and the unlikelihood of future, similar occurrences, renders the question posed by petitioners unimportant.

The position of petitioners, in substance, is merely that they are dissatisfied with the decisions below; and here they only seek appellate relief.

Respondent American Airlines, Inc., respectfully submits that the Petition for Writ of Certiorari should be denied.

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MELVIN F. PIERCE,
First National Building,
Oklahoma City, Oklahoma,

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American Airlines, Inc.

APPENDIX

BOLIVIAN AIR CRASH CASES

(1) Nora Bates, Administratrix of Estate of George L. Bates Plaintiff vs. Eastern Airlines, Inc. Erick Rios Bridoux Paul M. Aubin and L. G. Lyons, Copartners, Trading as Universal Air and Marine Supply Co. Defendants	C.A. No. 2930-50	D.C. D.C.
(2) Porter Sims, Executor of Estate of Elizabeth S. Bent Plaintiff vs. United States	C.A. No. 4681-50	D.C. D.C.
(3) Porter Sims, Executor of Estate of Elizabeth S. Bent Plaintiff vs. Eastern Airlines, Inc. Erick Rios Bridoux Paul M. Aubin and L. G. Lyons, Copartners, Trading as Universal Air and Marine Supply Co. Defendants	C.A. No. 4397-50	D.C. D.C.

(4) Porter Sims, Executor of Estate of Elizabeth S. Bent, Plaintiff vs. United States of America, Defendant	C.A. No. 543	D.C. E.D. Va.
(5) Mildred Casey, Administratrix of the Est. of William J. Casey, deceased, Plaintiff vs. United States of America, Defendant	C.A. No. 61-364	D.C.S.D. N.Y.

STIPULATION

WHEREAS, all of the death actions captioned above arise out of a mid-air collision between an Eastern Air Lines passenger plane and a P-38 plane operated by Eric Rios Bridoux, which took place on November 1, 1949, when both planes were approaching Washington National Airport and involve among other issues, two issues which are common to all of the captioned cases, viz., (1) the liability of the respective defendants, and (2) whether the applicable wrongful death statute is that of the Commonwealth of Virginia or that of the District of Columbia.

Whereas, the following four actions (hereinafter referred to as the *Miller* cases) in the United States District Court for the District of Columbia, entitled,

Union Trust Company of the District of Columbia as Executor of the Estate of Mildred E. Miller, et al.,

-vs-

Civil Action No. 1892-50

Eastern Air Lines, Inc., Eric Rios Bridoux and Paul Aubin and L. C. Lyons, Co-partners, etc.

Union Trust Company of the District of Columbia as Executor of the Estate of Mildred E. Miller, et al.,

-vs-

Civil Action No. 4692-50

United States of America

Union Trust Company of the District of Columbia, as Executor of the Estate of Ralph F. Miller, deceased, et al.

-vs-

Civil Action No. 1893-50

Eastern Air Lines, Inc., Eric Rios Bridoux and Paul Aubin and L. C. Lyons, Co-partners, etc.

Union Trust Company of the District of Columbia, as Executor of the Estate of Ralph F. Miller, deceased, et al.

-vs-

Civil Action No. 4691-40

United States of America

are death actions which arise out of the same accident, are expected to be tried October 1952; and present the same two common issues, and;

WHEREAS, the parties hereto for the purpose of saving the time and expense which would be necessitated by separate and multiple trials of these two common issues

desire to make respective cases dependent upon and bound by such decision of those two issues as is finally made in the Miller cases;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties in each of the above-entitled cases, by and through their respective attorneys thereunto duly authorized, as follows:

1. No trial shall be had in any of the cases captioned above until the *Miller* cases have proceeded to final judgment and until all appeals, intermediate and final, have been had, or the time within which such appeals may be had has expired;

2. The final decision in the *Miller* cases on the (a) question of liability of the various defendants named in the *Miller* cases, and (b) the question as to whether the Wrongful Death Statute of the District of Columbia or the Commonwealth of Virginia is applicable, shall be conclusive and binding on these issues upon all of the parties to this stipulation in each of the cases captioned above;

3. Should the Court find in the *Miller* cases that the claims arose in Virginia and not in the District of Columbia, nothing in this stipulation shall be construed so as to prevent the United States from asserting in the above captioned cases, other than the *Miller* cases, the alleged defense that the United States District Court for the District of Columbia is without jurisdiction. Nor shall this stipulation be construed as an admission by any of the plaintiffs that a question of jurisdiction is presented.

4. Each counsel signing this stipulation thereby represents he has authority to bind the parties for whom he signs, and;

5. Upon approval of this stipulation by Judge Matthew F. McGuire of the United States District Court for the Dis-

trict of Columbia, it shall become binding upon all parties hereto.

/s/ Ross O'Donoghue
Ross O'Donoghue
Special Assistant to the Attorney General
Attorney for the defendant, U. S. A.

/s/ Richard W. Galiher
Richard W. Galiher
Attorney for defendant
Eastern Airlines, Inc.

/s/ Irene Kennedy
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/s/ Cornelius H. Doherty
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Accident and Indemnity Company
in captioned cases 56, 57

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65, 66, 67, 68, 69

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David G. Bress
Attorney for the plaintiffs
in captioned cases 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 58, 59, 60, 61, 62, 63, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 95, 96, 97, 101, 102, 103, 104, 106, 107.

Approved this 17th day of September, 1952.

/s/ Matthew F. McGuire
JUDGE